Editor's note: Reconsideration denied by order dated Sept. 9, 1981

GARY WILLIS

IBLA 81-605 Decided July 22, 1981

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting mining claim recordation filings and declaring those mining claims null and void ab initio. AA-20893 through AA-20910.

Affirmed.

1. Hearings -- Mining Claims: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Location -- Mining Claims: Relocation -- Mining Claims: Withdrawn Land

   While it may be appropriate in some cases to refer a matter for a hearing before an Administrative Law Judge to determine whether a mining claim, the location notice for which is dated after withdrawal of the land, is based on an amended location and thus survives withdrawal of the land for mining purposes, the allowance of a request for a hearing is within the discretion of the Board, and this discretion is likely to be employed to deny the request for hearing where the appellant has failed to provide the Board with any evidence to support the allegation that the amended location can be proved.

2. Administrative Procedure: Hearings -- Constitutional Law: Due Process -- Hearings -- Rules of Practice: Appeals: Effect of -- Rules of Practice: Hearings

   Due process does not require notice and a right to be heard in every case where

a person is deprived of an asserted property right so long as the individual is given notice and an opportunity to be heard before the initial Bureau of Land Management decision, adverse to him, becomes final. Appeal to this Board satisfies the due process requirements.

3. Estoppel -- Public Records

Where the Bureau of Land Management file pertaining to a particular mining claim group contains information showing the claims to be null and void, the assignee who has failed to check the file runs the risks which flow from failure to so check that public record.

4. Administrative Authority: Generally -- Mining Claims: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Lands Subject to -- Mining Claims: Withdrawn Land

Under the "equal-footing" doctrine, a state has title to lands beneath its navigable rivers, and this Board has no jurisdiction to determine the validity of such riverbed mining claims asserted under state law. However, where an unpatented mining claim is filed for record with the Bureau of Land Management pursuant to the Federal mining law and the public records disclose that all public lands embraced in the claim had been withdrawn from mining location before the claimant located the mining claim, the filing is properly rejected by BLM and the claim declared null and void ab initio.

APPEARANCES: William B. Murray, Esq., Portland, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

On November 3, 1978, William H. McFarland and Kenneth J. Lewis filed with the Alaska State Office of the Bureau of Land Management (BLM), mining claim location notices for 18 unpatented placer claims, Persistence Nos. 1-18, AA-20893 through AA-20910, as required by section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA),

43 U.S.C. § 1744 (1976), and the accompanying regulations in 43 CFR 3833. The location notices state that the claims were located on September 10, 1978, and that they lie within an area encompassed by protracted T. 10 S., R. 11 E., Copper River meridian, Alaska, which became part of the Wrangell-St. Elias National Monument on December 1, 1978. Golconda Creek runs through each of the 18 claims.

On February 9, 1981, a letter was sent to the Alaska State Director of BLM by the Alaska Regional Director of the National Park Service, stating:

> Re: PERSISTENCE #1-18 placer mining claims, AA020893-AA020910, Wrangell-St. Elias National Park and Preserve
>
> The referred to mining claims are, according to information present in the BLM case file records and our findings, null and void.
>
> Location notices submitted to BLM for recordation purposes and filed with the State Recorders Office, show location dates of September 10, 1978. These notices make no mention of older claims being amended.
>
> The area containing the mining claims was withdrawn from further location and entry under the United States Mining Law, on March 16, 1972, by Public Land Order 5179. This land order was issued pursuant to Section 17(d)(2) of the Alaska Native Claims Settlement Act of 1971.
>
> Further, we note that BLM's automated data files contain an action entry that adjudicative action is required, based on the above mentioned facts.
>
> We request that BLM issue, as soon as possible, a Null and Void decision as a matter of law against the PERSISTENCE #1-18 mining claims.
>
> The National Park Service has notified the following claimants of this requested action:
>
> Mr. Kenneth J. Lewis
> Mr. William L. McFarland

On February 16, 1981, McFarland and Lewis conveyed by quitclaim deed their mining claims to Gary Willis, the appellant herein.

The BLM decision dated March 27, 1981, from which this appeal is taken, states in part:

> On March 15, 1972, Public Land Order (PLO) 5179 withdrew, among others, all of the lands in T. 10 S., R. 11 E., Copper River meridian, from all forms of appropriation under the public land laws, including location and entry under the mining laws, and reserved the lands "for study and review by the Secretary of the Interior * * *."
>
> It is well established that mining claims located on land withdrawn from mineral entry are null and void ab initio and are properly declared so, when, at the time of location, the lands were not open to mineral entry, W. R. C. Croley, 32 IBLA 5 (1977); Rod Knight, 30 IBLA 224 (1977).
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> When it may be observed that the lands were not open to entry at the time of the claim locations, there is no necessity for the Government to initiate formal contest proceedings, Rudolph Chase and Raymond W. Voss, 8 IBLA 351 (1972).
>
> Because the subject lands have been closed to mineral entry since March 15, 1972, mining claims located since that date were invalid from their inception. Therefore, the PERSISTENCE #1-18 placer mining claims are hereby declared to be null and void ab initio and the recordation filings are rejected. The case files will be closed when this decision becomes final.

The principles announced in BLM's decision are correct. Nevertheless, appellant argues for the reversal of the BLM decision. He asserts that the claims were first located in 1928, and that since this date was long prior to the effective date of Public Land Order No. 5179, the claims were located on ground open to mineral entry, and, thus, BLM's decision is in error. Appellant demands a hearing for the purpose of establishing that the 1978 filings were, in fact, amended locations relating back to the 1928 locations.

[1] In American Resources, Ltd., 44 IBLA 220 (1979), this Board noted the distinction between "relocation" of a claim and "amended location" of a claim:

> In contrast to a "relocation," an "amended location" does relate back to the date of the filing of original notice of location, so that the filer does receive the rights associated with the earlier location, including its superiority to subsequent withdrawals, to the extent that the amended location merely furthers rights acquired by a prior subsisting location, and does not include any new land.

> Withdrawal of the land subsequent to the original location will thus not preclude the amended location, provided that the original claim was properly located. [Emphasis in original.]

44 IBLA at 223. We also noted that "[a]s appellant may yet be able to establish an unbroken chain of title through previous claimants * * * which interests predate the withdrawal, it is appropriate to refer the matter for a hearing to allow it the opportunity to do so." Id. at 224-25. Note that while the facts in American Resources, Ltd., supra, made such a hearing "appropriate," we did not state that a hearing would be required in every case involving an issue of amended location. 43 CFR 4.415 states in pertinent part that "[t]he allowance of a request for hearing is within the discretion of the Board * * *." In American Resources, Ltd., supra, the record showed a significant possibility that the amended location could be proved. However, in this case the record does not contain evidence of any location of the claims before 1978. 1/ We are not unmindful of the statement by the Ninth Circuit Court of Appeals in United States v. Consolidated Mines

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1/ Section 314(b) of FLPMA, 43 U.S.C. § 1744(b) (1976), requires the filing with BLM of a copy of the official record of the notice of location. This "official record" is the one filed with the appropriate state office as required by state law. 43 CFR 3833.1-2. The record indicates that a search of the relevant records of the State of Alaska discloses, in addition to the notices of the September 10, 1978, locations, only the recordation of two lode claim locations, one recorded in 1901 and the other in 1956. Nothing has been filed with the State or with BLM that would support appellant's contention that a 1928 location was made, and there has been no proffer of records showing a chain of title connecting appellant's mining claim with a valid claim existing prior to the date the land in question was withdrawn. Indeed, a National Park Service (NPS) memorandum records the content of a January 13, 1981, telephone call to NPS from one of appellant's predecessors in interest, Kenneth Lewis, wherein Lewis declared that he and McFarland had "top filed" on the claims and that as of that date they had never received title from the former owner of the claims. Top filing connotes an adverse claim which is characteristic of a relocation of a claim that does not relate back to the original location, as opposed to an amended location which does. American Resources, Ltd., supra at 223-24.

As the "official record," the copy of the notice of location filed with BLM, bearing the location date of September 10, 1978, is given a presumption of controlling validity which appellant has not rebutted.

& Smelting Co., Ltd., 455 F.2d 432, 441 (1971), to the effect that a hearing may be required where the locator of a mining claim raises an issue of fact by asserting that a location made after withdrawal of the land is actually an amended location which relates back to a location prior to withdrawal, but we base our holding on the lack of any evidence of location of the subject claims prior to the withdrawal or of appellant's chain of title to such alleged locations. An amended location cannot be established in the absence of evidence of an original location notice and a chain of title from the holder of the original location to the party claiming to have amended the location. See United States v. Consolidated Mines & Smelting Co., Ltd., supra at 449. Appellant's statement of reasons for appeal asserts the 1928 date of location and, in conjunction therewith, mentions the affidavit of his predecessor in title, William H. McFarland. But unsupported assertions are not adequate evidence, and since we have not been provided with the affidavit or other significant evidence to support the 1928 location or appellant's chain of title thereto, we exercise our discretion to deny the request for a hearing before an Administrative Law Judge in this case.

[2] Contrary to appellant's contentions, the decision to deny him a hearing is not unconstitutional or violative of the Administrative Procedure Act. As we have previously stated:

> [D]ue process does not require notice and a right to be heard in every case where a person is deprived of an asserted property right so long as the individual is given notice and an opportunity to be heard before the initial BLM decision, adverse to him, becomes final. Appeal to this Board satisfies the due process requirements. State of Alaska, 46 IBLA 12 (1980).

George H. Fennimore, 50 IBLA 280 (1980). See also John J. Schnabel, 50 IBLA 201 (1980); Rudolph Chase, supra.

[3] Appellant next contends that the Department is estopped from declaring the 18 claims null and void ab initio because the National Park Service had approved plans to operate the claims, located in Wrangell-St. Elias National Monument, under its own regulation, 36 CFR Part 9, Subpart A. However, for the reasons stated in Edward L. Ellis and Steve R. Ellis, 42 IBLA 66 (1979), appellant's argument for estoppel must be rejected. 2/ Such relief is also not warranted where the

2/ To the elements of estoppel set forth in Edward L. Ellis, 42 IBLA at 69, must be added the further restricting element enunciated in United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978), "requiring an affirmative misrepresentation or affirmative concealment of a material fact by the government." That there was no affirmative misrepresentation or concealment is evident from the fact that

appellant could have avoided his predicament had he used reasonable care. 3/ Appellant should have checked the file pertaining to these mining claims before he entered into his transaction with McFarland and Lewis. Had he done so, he would have found the above-quoted letter of the Regional Director of the National Park Service, which BLM date stamped as received on February 12, 1981. Since appellant did not contract for his interest in the mining claims until February 16, 1981, he had 4 days in which to discover from that letter the fact that the Government considered these mining claims to be null and void. Although Winkler v. Andrus, 614 F.2d 707, 713 (10th Cir. 1980), involved a different issue, its language is apropos concerning the reasonableness of appellant's reliance: "[E]xamination of BLM records must be made for an assignee of a Federal mineral lease to be protected * * *. Otherwise, the assignee runs the risks which flow from failure to do so."

Appellant next raises the contention that since Golconda Creek flows through each of the 18 claims, these claims are within the jurisdiction of the State of Alaska. He says that "the gravel, banks, up to high water mark on the flood plain on either side of the Golconda, are clearly property of the State of Alaska, and not property over which the Federal Government has jurisdiction." He asserts that Oregon v. Corvallis Sand and Gravel Co., 429 U.S. 363, 97 S. Ct. 582 (1977), is dispositive on this point.

In that case the Supreme Court stated that "the original States held the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution." 429 U.S. at 373 (internal quotation marks omitted). The Court then stated, "[T]he new states have the same rights, sovereignty, and jurisdiction over this subject as the original states." Id. The Court also notes that this "equal-footing" doctrine makes "the title and rights of riparian or littoral proprietors in the soils below the high-water mark" subject to "the laws of the several states, subject to the rights granted to the United States by the Constitution." 4/ Id. at 375.

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fn 2 (continued)
NPS labeled the authorizations "temporary," and explained that "[a] final determination of the legality of your claim has yet to be made" (Respondent's Answer, at 8, quoting from National Park Service records).
3/ This Board "can refuse to apply the doctrine [of estoppel] when equity-policy considerations so demand, even though the technical elements may be present." United States v. Ruby Co., supra at 704.
4/ The Court indicated that the major right of the United States which is of relevance here is that of regulating commerce upon the navigable waters.

[4] We do not know whether Golconda Creek falls within the rule established by the Supreme Court with respect to navigable waters. However, if the State of Alaska does properly have jurisdiction over the creek and the land beneath it, this Board would obviously be without jurisdiction to declare what rights, if any, appellant has to develop mining claims there. Such powers are vested in the State. But this does not impair the jurisdiction of the Board to rule upon the validity of unpatented mining claims purporting to be located on Federal lands and recorded under section 314 of FLPMA and, therefore, this Board can and does declare, for the foregoing reasons, that appellant has no valid claim or right under Federal law, and that BLM has acted properly in rejecting the mining claim filings and declaring those claims null and void ab initio.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge